

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WILLIAM AIELLO,

Plaintiff,

vs.

THE KROGER COMPANY, an Ohio  
corporation, dba RALPHS GROCERY  
COMPANY d/b/a/ FOOD 4 LESS STORE  
#790,

Defendants.

2:08-cv-01729-HDM-RJJ

**ORDER**

This matter is before the Court on Plaintiff William Aiello's Motion for Spoliation of Evidence (#23). The Court has considered Plaintiff's Motion (#23); Defendant's Response (#25); Plaintiff's Reply (#26); and arguments presented during a hearing on the matter.

**BACKGROUND**

This is a personal injury action wherein Plaintiff William Aiello alleges that he sustained injuries as a result of a slip-and-fall on Defendant Food 4 Less' premises. Aiello seeks an order for an adverse inference due to Food 4 Less' "loss" of a surveillance video. Aiello also seeks an order precluding Food 4 Less employees who claim to have reviewed the surveillance video from offering testimony based upon that review.

The events giving rise to this litigation occurred on August 4, 2006, when, according to Aiello, he "tripped and fell over a stocking cart" positioned "directly behind [him] ... while his back was turned." *See* Plaintiff's Motion (#23) at 3. Immediately after the alleged incident, Aiello filled out an accident report. The incident was also recorded on video by a Food 4 Less surveillance

1 camera. The surveillance video was reviewed by Food 4 Less employees, including the store  
 2 director. After reviewing the accident report and surveillance video, the materials were sent to Risk  
 3 Management Division at Food 4 Less' corporate headquarters in Compton, CA. During the course  
 4 of discovery, Food 4 Less disclosed that it had "lost" the surveillance video.

5 Food 4 Less argues that an adverse inference instruction is not warranted in this case because  
 6 the surveillance video was not wilfully lost or destroyed. Food 4 Less also argues that, even if the  
 7 Court permits an adverse inference instruction, its employees should be permitted to testify regarding  
 8 the content of video to rebut the adverse inference.

### 9 DISCUSSION

10 There are two sources of authority under which a court can sanction a party for spoliation of  
 11 evidence – its inherent authority or Rule 37. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir.  
 12 2006). Regardless of whether it is under Rule 37 or its inherent authority, a federal court applies  
 13 federal law when addressing issues of spoliation of evidence. *Glover v. BIC Corp.*, 6 F.3d 1318,  
 14 1329 (9<sup>th</sup> Cir. 1993) (applying federal law when addressing spoliation in diversity litigation)); *see*  
 15 *also e.g., Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009); *Silvestri v. Gen. Motors Corp.*, 271  
 16 F.3d 583, 590 (4th Cir. 2001); *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 267 (2d Cir. 1999);  
 17 *King v. Ill. Cent. R. R.*, 337 F.3d 550, 556 (5th Cir. 2003). Here, Aiello requests that the Court  
 18 exercise its inherent authority and enter an order (1) for an adverse inference instruction based upon  
 19 Food 4 Less' failure to retain the video surveillance of the disputed events and (2) precluding Food  
 20 4 Less from offering testimony from its employees regarding the content of the video.

21 "A federal trial court has the inherent discretionary power to make appropriate evidentiary  
 22 rulings in response to the destruction or spoliation of relevant evidence." *Glover*, 6 F.3d at 1329.  
 23 The Court's broad authority includes the power to permit an adverse inference from the spoliation  
 24 of relevant evidence against the spoliating party. *See Akiona v. United States*, 938 F.2d 158, 161 (9th  
 25 Cir. 1991). "An adverse inference is an instruction to the trier of fact that 'evidence made  
 26 unavailable by a party was unfavorable to that party.'" *Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D.  
 27 Cal. 2009). The Ninth Circuit has explained:

28 [t]he adverse inference sanction is based on two rationales, one evidentiary

1 and one not. The evidentiary rationale is nothing more than the common  
 2 sense observation that a party who has notice that a document is relevant to  
 3 litigation and who proceeds to destroy the document is more likely to have  
 4 been threatened by the document than is a party in the same position who  
 5 does not destroy the document.... The other rationale for the inference has to  
 6 do with its prophylactic and punitive effects. Allowing the trier of fact to  
 7 draw the inference presumably deters parties from destroying relevant  
 8 evidence before it can be introduced at trial.

9 *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991). A finding of bad faith is not a  
 10 prerequisite for an adverse inference. *Glover*, 6 F.3d at 1329.

11 The question in this case is not whether the surveillance video was relevant but, whether  
 12 Food 4 Less had sufficient notice of the claim, or potential claim, so that its duty to preserve the  
 13 surveillance video was triggered. A party is guilty of spoliation of evidence only if it had “some  
 14 notice that the [evidence was] potentially relevant to the litigation.” *United States v. Kitsap*  
 15 *Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002) (citation omitted). Spoliation is not limited  
 16 to circumstances arising after a case is filed or a discovery request is made. Rather, “[s]anctions may  
 17 be imposed against a litigant who is on notice that documents and information in its possession are  
 18 relevant to ... potential litigation.” *Continental Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, --- F.R.D.  
 19 ---, 2010 WL 1266926 (E.D. Cal.); *see also United States v. Maxxam, Inc.*, 2009 WL 817264 (N.D.  
 20 Cal.) (citing *Wm. Thomas Co. v. General Nutrition Corp., Inc.*, 593 F.Supp. 1443, 1455 (C.D. Cal.  
 21 1984)); *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1390 n. 9 (9th Cir. 1987) (citing  
 22 with approval *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 423, 427 (N.D.  
 23 Ind. 1977) for the proposition that sanctions are appropriate where party destroyed evidence it should  
 24 have known would be relevant in future litigation).

25 Although the Ninth Circuit has not expressly defined the term “potential litigation” in this  
 26 context, it is widely accepted that, as a general rule, a party has a “duty to preserve evidence when  
 27 it knows or reasonably should know the evidence is relevant and when prejudice to an opposing  
 28 party is foreseeable.” *Ryan*, 261 F.R.D. at 518 (citation omitted); *see also Performance Chevrolet,*  
*Inc. v. Market Scan Info. Sys.*, 2006 WL 1042359 (D. Idaho) (“The majority of courts have held that  
 pre-litigation destruction can constitute spoliation when litigation was reasonably foreseeable....”).  
 The duty to preserve evidence arises when a party has notice of a potential claim. *E.g., Taylor v.*

1 *Market Transport Ltd.*, 2010 WL 959931 (W.D. Wash.); *Realnetworks, Inc. v. DVD Copy Control*  
2 *Ass'n, Inc.*, --- F.R.D. ---, 2009 WL 1258970 (N. D. Cal.); *Hynix Semiconductor Inc. v. Rambus Inc.*,  
3 591 F.Supp.2d 1038 (N.D. Cal. 2006).

4       Unfortunately, the record is silent as to when the surveillance video was “lost” in relation  
5 to when the litigation actually began. However, immediately after the incident, Aiello filled out an  
6 accident report which, arguably, is sufficient to put Food 4 Less on notice of potential litigation.  
7 Moreover, a Food 4 Less store manager extracted, reviewed, and sent the surveillance video to the  
8 Risk Management Department at Food 4 Less’ corporate headquarters. She testified during her  
9 deposition that she sent the video because she was aware of the incident and of the alleged injuries  
10 because she “knew it [the surveillance video] would cover us ....” *See* Exhibit B attached to  
11 Defendant’s Response (#25). Based on this record, the Court finds that Food 4 Less, at a minimum,  
12 had notice of the potential litigation at the time the video was sent to its corporate headquarters. This  
13 triggered its duty to preserve the video.

14       Nevertheless, Food 4 Less’ contends that an adverse inference is inappropriate because it did  
15 not wilfully suppress or destroy the evidence. The loss or destruction of evidence qualifies as willful  
16 spoliation if the party ““has some notice that the documents were potentially relevant to the  
17 litigation”” before they were lost. *Leon v. IDX Systems Corp.* 464 F.3d 951, 959 (9th Cir. 2006)  
18 (citing *Kitsap Physicians Serv.*, 314 F.3d at 1001). Food 4 Less’ failure to preserve the surveillance  
19 video, although perhaps not in bad faith, certainly qualifies as “willful” in these circumstances.  
20 Accordingly, the Court will grant the request for an adverse inference.

21       The Court also rejects Food 4 Less’ alternative argument that, even in the face of an adverse  
22 inference instruction, it should not be precluded from offering testimony from its employees who  
23 viewed the surveillance video and wish to testify regarding the content of the video. Food 4 Less’  
24 “loss” of the surveillance video is undisputed. As a consequence, Aiello was never given the  
25 opportunity to inspect the video and any testimony from the spoliating party regarding the content  
26 of the video would be unreliable and unfairly prejudicial. *See Unigard Sec. Ins. Co. v. Lakewood*  
27 *Engineering & Mfg. Corp.*, 982 F.2d 363, 369 (9th Cir. 1992) (upholding the exclusion of expert  
28 testimony based upon improperly destroyed evidence). Although this might make Food 4 Less’


1 defense of the case more difficult, the sanction is not, as suggested by Food 4 Less, insurmountable.  
2 Food 4 Less is not precluded from presenting testimony regarding its version of the event, but, under  
3 the circumstances, will have to do so without reference to the surveillance video.

4 Based on the foregoing, and good cause appearing therefore,

5 IT IS HEREBY ORDERED that Plaintiff William Aiello's Motion for Spoliation of  
6 Evidence (#23) is **GRANTED**. The Court will provide an adverse inference instruction against  
7 Defendant Food 4 Less for its failure to retain the surveillance video of the alleged incident.

8 IT IS FURTHER ORDERED that Defendant Food 4 Less is precluded from offering  
9 testimony from any witness regarding the content of the surveillance video during trial.

10 DATED this 1<sup>st</sup> day of September, 2010.

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14 ROBERT J. JOHNSTON  
United States Magistrate Judge  
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